Filed 12/7/16 P. v. Dixon CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GREGORY THOMAS DIXON, Defendant and Appellant.	E063633 (Super.Ct.No. SWF1401359) OPINION

APPEAL from the Superior Court of Riverside County. Angel M. Bermudez, Judge. Affirmed as modified.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Heidi Salerno, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Gregory Thomas Dixon guilty of carjacking (Pen. Code, § 215, subd. (a); count 1);[1] attempting to evade a police officer (Veh. Code, § 2800.2; count 2); felon in possession of a firearm (Pen. Code, § 29900; count 3); and vandalism greater than $400 (§ 594, subd. (b)(1); count 4). The jury also found true that defendant had personally used a firearm (§ 12022.53, subd. (b)) during the commission of count 1 and that a principal was armed with a firearm (§ 12022, subd. (a)(1)) during the commission of count 2. The trial court subsequently found true that defendant had suffered two prior prison terms (§ 667.5, subd. (b)), three prior serious felony convictions (§ 667, subd. (a), and three prior strike convictions (§§ 667, subds. (c) & (e)(2)(A), 1170.12, subd. (c)(2)A)). As a result, defendant was sentenced to a total indeterminate term of 77 years to life and a determinate term of 21 years four months, with credit for time served.

On appeal, defendant contends (1) the trial court erred in sentencing him on counts 2 and 3 under the "Three Strikes" law because the People failed to plead and prove he was armed with a firearm during the commission of each offense; and (2) the trial court erred in failing to stay his sentence on either count 2 or count 4. We agree that defendant's sentence on count 4 should have been stayed pursuant to section 654 and modify the judgment accordingly. We reject defendant's remaining contention.

[1] All future statutory references are to the Penal Code unless otherwise stated.

I

FACTUAL BACKGROUND

On May 28, 2014, at around 2:10 a.m., the victim arrived at her work, the Hemet post office, and parked her 2010 Ford Fusion in her usual parking spot. When she arrived, she had her iPhone, keys, a box cutter, a green leather purse that contained her wallet with various cards and $385 in cash, and a Lunchable lunch pack with ham, cheese, and vanilla cookies. The victim was scheduled to work at 2:30 a.m., so she stayed in her car for a few minutes and smoked a cigarette. About 10 minutes later, the victim grabbed her iPhone, keys, box cutter, pens, and badge, and began to step out of her car.

As the victim stepped one foot out of her car, a man wearing a black hoodie, a black mask over his face, black gloves, and dark clothing pointed a small silver handgun at her and told her to drop everything and get out of the car. The man's voice was deep, soft and calm. The victim froze, and the man repeated his commands. The victim dropped the items onto the driver's side floorboard and got out. The man then told the victim to lie on the ground. After the victim laid face down on the ground, the man got into her car, started it, and drove away.

The victim got up from the ground, went into the post office, and had a coworker call 911. Officer Derick Spoelstra soon arrived at the post office, and took the victim's statement about the incident and broadcasted the information to other officers. The victim also related that she could use the " 'find my iPhone' " application to track her

iPhone. The victim and Officer Spoelstra used the application to locate the victim's cell phone, which was around the corner from the post office. Officer Spoelstra then drove the victim around the corner and found her car with her iPhone and badge inside. The victim's purse, box cutter, and Lunchable were missing.

Minutes earlier, Officer Dean Benjamin was patrolling about 10 blocks east of the post office when he heard the priority dispatch call regarding a carjacked black Ford Fusion at the post office. Within minutes, he saw a black car resembling the stolen black Ford Fusion traveling at speeds of 65 to 70 miles per hour down a residential street. Officer Benjamin followed the vehicle, and notified dispatch that he was pursuing the suspected carjacked vehicle. When Officer Benjamin caught up to the vehicle, the lights of the vehicle went off and the vehicle ran a stop sign at about 40 miles per hour. Officer Benjamin activated the patrol vehicle's siren and overhead lights to stop the vehicle; however, the vehicle did not stop, quickly turned, and accelerated to 70 miles per hour through narrow residential streets. A pursuit ensued with the driver appearing to throw something out a window—later identified as the victim's purse. The vehicle continued to travel at a high rate of speed and run red lights and stops signs until it lost control and crashed into a parked Hummer vehicle.[2] At that point, Officer Benjamin was right behind the vehicle, and observed the driver, identified as defendant, wearing a black shirt

[2] The Hummer had significant damage and was declared to be totaled by the owner's insurance company. The owner received a $29,000 check from the insurance company.

with a black and grey tie. Officer Benjamin did not see anyone else in the vehicle. Defendant immediately exited the vehicle and fled on foot. Other officers arrived at the scene and eventually found defendant hiding in a shed in the back of a house.

Officer Benjamin looked closer at the vehicle and determined it was a Nissan Versa. Upon searching the vehicle, Officer Benjamin found a small loaded silver handgun on the front passenger floorboard, a black knit glove, and a Lunchable containing vanilla cookies. The victim stated that the handgun found in the Nissan looked similar to the handgun pointed at her during the carjacking and that the Lunchable found in the Nissan was similar to the Lunchable taken from her car.

Defendant admitted driving the Nissan and crashing into the Hummer but denied committing the carjacking, evading a peace officer, or knowingly having possession of a firearm. He claimed that he was out driving the Nissan when he saw a guy he knew, "B.J.," walking on a street.[3] He offered J.B. a ride and J.B. accepted and got in the front passenger seat. He further stated that while he was driving, he saw a speeding car, and J.B. told him to "go, go," so he sped up to get away from that car, but he did not know it was a police vehicle. He then made a few turns to lose that vehicle and J.B. suddenly jumped out of his car while it was moving. He continued to drive, but after a short distance he crashed into the Hummer. Defendant claimed that he fled from Officer

[3] Defendant initially testified on direct and cross-examination that his friend's name was B.J., but then during cross, he claimed B.J. was only an "associate" and his name was J.B., not B.J. For purposes of clarity, we will refer to defendant's friend or associate as "J.B."

Benjamin because he had previous problems with Officer Benjamin and he was on parole. He also asserted that he did not know how the handgun or the Lunchable got into the Nissan.

II

DISCUSSION

A. *Three Strike Sentence on Counts 2 and 3*

Defendant argues that the trial court violated his due process rights when it imposed 25-year-to-life terms on the evading a peace officer (count 2) and felon in possession of a firearm (count 3) offenses, because the prosecution failed to plead and/or prove he was armed with a firearm during the commission of those offenses. As to count 2, he maintains the prosecution erred by alleging a *principal* was armed with a firearm rather than pleading defendant was personally armed with a firearm during the evading offense. As to count 3, defendant argues the prosecution failed to plead and prove he was armed with the firearm "during [the] commission" of that offense.

On November 6, 2012, the voters approved Proposition 36, the Three Strikes Reform Act of 2012, which amended sections 667 and 1170.12 and added section 1170.126 (hereafter the Reform Act). The Reform Act changes the requirements for sentencing a third strike offender to an indeterminate term of 25 years to life imprisonment. "Under the original version of the three strikes law a recidivist with two or more prior strikes who is convicted of any new felony is subject to an indeterminate life sentence. The [Reform] Act diluted the three strikes law by reserving the life

sentence for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor. In all other cases, the recidivist will be sentenced as a second strike offender. (§§ 667, 1170.12.)" (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-168.)

Specifically, the amended law states that "[i]f a defendant has two or more prior serious and/or violent felony convictions as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7 that have been pled and proved, and the current offense is not a serious or violent felony as defined in subdivision (d), the defendant shall be sentenced [as a second strike offender] unless the prosecution pleads and proves" one or more of several disqualifying factors. (§ 667, subd. (e)(2)(C); § 1170.12, subd. (c)(2)(C).) There is no dispute that, under the Reform Act, attempting to evade a peace officer and felon in possession of a firearm are not serious or violent felonies under section 667.5, subdivision (c), or section 1192.7, subdivision (c). However, the disqualifying factor applicable here is if the prosecution pleads and proves that "[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).)

"Due process requires that an accused be advised of the specific charges against him so he may adequately prepare his defense and not be taken by surprise by evidence offered at trial. [Citations.] This means that except for lesser included offenses, an accused cannot be convicted of an offense of which he has not been charged, regardless

of whether there was evidence at his trial to show he committed the offense. [Citation.] An exception exists if the accused expressly or impliedly consents or acquiesces in having the trier of fact consider a substituted, uncharged offense. [Citations.] The same rules apply to enhancement allegations. [Citation.]" (*People v. Haskin* (1992) 4 Cal.App.4th 1434, 1438; accord, *People v. Mancebo* (2002) 27 Cal.4th 735, 750 (*Mancebo*); see *People v. Ford* (1964) 60 Cal.2d 772, 794[4] ["Before a defendant can properly be sentenced to suffer the increased penalties flowing from [a prior conviction, or being armed with a deadly weapon] the fact of the prior conviction or that the defendant was thus armed must be charged in the accusatory pleading, and if the defendant pleads not guilty thereto the charge must be proved and the truth of the allegation determined by the jury, or by the court if a jury is waived."].)

As to the evading offense (count 2), the prosecution alleged in the first amended information that "in the commission and attempted commission" of count 2, defendant "participated as a principal knowing that another principal in said offense was armed with a firearm . . . said arming not being an element of the [evading] offense, within the meaning of Penal Code section 12022, subdivision (a), subsection (1)." Section 12022, subdivision (a)(1), specifically provides: "(a)(1) Except as provided in subdivisions (c) and (d), a person who is armed with a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment pursuant

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[4] *Ford* was overruled on other grounds by *People v. Satchell* (1971) 6 Cal.3d 28, 35-36, *Satchell*, in turn, was overruled by *People v. Flood* (1998) 18 Cal.4th 470, 484-490.

to subdivision (h) of Section 1170 for one year, unless the arming is an element of that offense. This additional term shall apply to a person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm."

As to the felon in possession of a firearm (count 3), the prosecution alleged in the first amended information that defendant "did wilfully and unlawfully own and have in his possession and under his custody and control a certain firearm, to wit, a .22 SEMI-AUTOMATIC" which was "connected in its commission" with the carjacking (count 1) and the evading (count 2) offenses (§ 29900) "having been previously convicted of a violent offense to wit, the crime of ROBBERY on November 5, 2001 in violation of Penal Code section 211."

" '[A]rmed with a firearm' has been statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively. (E.g., § 1203.06, subd. (b)(3); Health & Saf. Code, § 11370.1, subd. (a); *People v. Bland* (1995) 10 Cal.4th 991, 997 . . . (*Bland*) [construing § 12022].) 'The enacting body is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted' (*People v. Weidert* (1985) 39 Cal.3d 836, 844 . . .), 'and to have enacted or amended a statute in light thereof' (*People v. Harrison* (1989) 48 Cal.3d 321, 329 . . .). 'This principle applies to legislation enacted by initiative. [Citation.]' (*People v. Weidert*, *supra*, at p. 844.)" (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029 [concluding that the electorate in enacting section 1170.12, subdivision (c)(2)(C)(iii)

intended "armed with a firearm," as that phrase is used in the Reform Act, to mean having a firearm available for offensive or defensive use].) After analyzing *Bland*, this court in *People v. Brimmer* (2014) 230 Cal.App.4th 782 also concluded that "armed with a firearm" within the meaning of the Reform Act means having a firearm available for offensive or defensive use. (*Id*. at pp. 794-796.)

Here, the prosecution pleaded and proved defendant was armed with a firearm during the commission of counts 2 and 3. The first amended information sufficiently provided notice of the armed-with disqualifying factor as to both counts. Overwhelming evidence showed that defendant acted alone and was the principal personally armed with the firearm during the commission of both offenses. As instructed, the jurors found that "one of the principals was armed with a firearm in the commission of that crime." The instructions stated, "A principal is armed with a firearm when that person [] [] [c]arries a firearm or has a firearm available for use in either offense or defense" and "[k]nows that he or she is carrying the firearm." As to count 3, the jurors were instructed that the People had to prove beyond a reasonable doubt defendant "possessed a firearm," defendant "knew that he possessed the firearm," and defendant had previously been convicted of a felony. The prosecution did not argue that there was another principal involved in the offenses. Rather, the prosecution maintained that defendant acted alone and was the defendant who was armed. There was no evidence presented otherwise, except defendant's self-serving statement that was impliedly rejected by the jury. Moreover, the evidence did not support defendant's story that another principal was

involved. J.B. did not testify at trial. Officer Benjamin did not see anyone jump out of defendant's car during the pursuit. And, after the crash, Officer Benjamin did not find anyone in defendant's car.

The evidence showed that defendant used a silver handgun to commit the carjacking. The evidence further established that shortly after defendant lost control of his car while attempting to evade the police, officers found the silver handgun used in the carjacking on the passenger floorboard of defendant's car. The handgun was close to defendant's proximity and readily available for offensive or defensive use during the commission of counts 2 and 3. During the commission of count 3, defendant personally used the firearm, having it in his hand, to commit the carjacking. And, defendant continued to be armed with a firearm while committing the evading offense. There was no evidence to support defendant's self-serving statement that J.B. had been in his vehicle. Because the evidence demonstrated defendant acted alone, the prosecution proved defendant was the principal person armed with the firearm during the commission of counts 2 and 3. Furthermore, the first amended information specifically provided the charges against defendant so he may adequately prepare his defense and not be taken by surprise by evidence offered at trial. (*People v. Haskin, supra*, 4 Cal.App.4th at p. 1438.) The information alleged every fact necessary to place defendant on notice of what conduct he had to defend against as well as the punishment under the Reform Act.

In support of his argument, defendant relies on *Mancebo*, *supra*, 27 Cal.4th 735, which addressed the imposition of a sentence under the One Strike law, not the Three

Strikes law at issue here.[5] Defendant asserts that, under the reasoning of *Mancebo*, the trial court's imposition of a third strike sentence was unauthorized because the information did not specify that he was personally armed with a firearm during the commission of counts 2 and 3 and therefore defendant did not have any notice the prosecution was seeking anything other than a second strike sentence on these two convictions.

In *Mancebo*, the defendant was sentenced under the mandatory sentencing provision of the One Strike law "to two indeterminate 25-year-to-life terms for having committed forcible rape against one victim under the specified circumstances of gun use and kidnapping, and forcible sodomy against the other victim under the specified circumstances of gun use and tying or binding." (*Mancebo, supra*, 27 Cal.4th at p. 738.) The jury also found that the defendant "personally used a gun in committing each

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[5] The "One Strike" law, found in section 667.61, "sets forth an alternative and harsher sentencing scheme for certain enumerated sex crimes perpetrated by force." (*Mancebo, supra*, 27 Cal.4th at p. 741.) The provision "applies if the defendant has previously been convicted of one of seven specified offenses, or if the current offense was committed under one or more specified circumstances. Subdivision (a) provides that if defendant has previously been convicted of an offense enumerated in subdivision (c), or *if two of the circumstances specified in subdivision (e) apply* to the current offenses, an indeterminate term of 25 years to life shall be imposed. Subdivision (b) provides that *if one of the circumstances specified in subdivision* (*e*) *applies*, an indeterminate term of 15 years to life shall be imposed. Subdivision (i) requires the facts of any specified circumstance to be pled and proved to the trier of fact or admitted by the defendant in open court. Subdivision (f) provides that if only the minimum number of qualifying circumstances required for One Strike sentencing treatment have been pled and proved, they must be used as the basis for imposing the One Strike term rather than to impose lesser enhancements or punishment under any other law." (*Id*. at pp. 741-742, italics added.)

offense" and the court imposed additional 10-year gun-use enhancements for each count under section 12022.5, subdivision (a). (*Mancebo*, *supra*, at p. 738.)

On appeal, the defendant asserted that the imposition of the 10-year sentence enhancements for gun use under section 12022.5, subdivision (a), violated the pleading and proof requirements of section 667.61 and his "due process right to fair notice because there was no notice that the People, for the first time at sentencing, would seek to invoke the multiple victim circumstance, to support One Strike sentencing so that gun use would become available as a basis for imposing additional section 12022.5, [subdivision] (a) enhancements." (*Mancebo*, *supra*, 27 Cal.4th at p. 739.) The Attorney General conceded its error in failing to allege the multiple victim circumstance enhancement for purposes of one strike sentencing, but asserted that the error was harmless because the "the charging and conviction of crimes against both victims effectively alleged and established that circumstance." (*Ibid*.)

The Supreme Court rejected the People's argument, holding that the plain language of section 667.61, subdivision (i), required "all enumerated circumstances, including the multiple victim circumstance, to be specifically alleged in the information and proved before the People could invoke them in support of a One Strike sentence." (*Mancebo*, *supra*, 27 Cal.4th at pp. 740-741.) The court also based its holding on "subdivision (f) of section 667.61[, which] provides, in pertinent part, that 'If only the minimum number of circumstances specified in subdivision (d) or (e) which are required for [one strike sentencing] to apply have been *pled and proved*, that circumstance or

those circumstances shall be used as the basis for imposing [the one strike term] *rather than being used to impose the punishment authorized under any other law*, unless another law provides for a greater penalty.' (Italics added.)" (*Mancebo*, *supra*, at pp. 743-744.)

Because "[t]he record establishe[d] that only two circumstances enumerated in section 667.61, subdivision (e) were specifically alleged and proved with respect to each victim" and that "[n]either the original nor the amended information ever alleged a multiple victim circumstance under subdivision (e)(5)," the multiple victim circumstance could not be used as a basis to impose a one strike term. (*Mancebo*, *supra*, 27 Cal.4th at pp. 742-743.) As a result, the Supreme Court affirmed the Court of Appeal's opinion striking the gun-use enhancement from the defendant's aggregate sentence. (*Id*. at p. 754.)

As noted previously, the Reform Act as set forth in sections 667 and 1170.12, requires that when the current felony is not a serious or violent felony, the prosecutor must plead and prove an enumerated disqualifying factor to invoke the greater penalty of an indeterminate three strike term. (§§ 667, subd. (e)(2)(A), (C), 1170.12, subd. (c)(2)(C).) The required level of specificity in pleading that defendant asserts is not mandated by *Mancebo* or by the due process notification concerns that underlie that case. *Mancebo* "involved the imposition of a statutory enhancement that was *not* pleaded in the charging document," and instead, could only be inferred from the final jury verdict. (*In re Varnell* (2003) 30 Cal.4th 1132, 1143, italics added.) Unlike the multiple victim enhancement concededly absent from the charging documents in that case, the

information here specifically pleaded defendant's eligibility for punishment as a third strike offender and set forth the firearm allegation that disqualified defendant from the relief provided by the Reform Act.[6] By pleading the gun-use enhancement in count 2 and by pleading that defendant had the handgun in his possession and under his control and custody, the prosecution provided defendant adequate notice that he was disqualified from the benefits of the Reform Act and that he faced an indeterminate sentence of 25 years to life under the Three Strikes law.

Accordingly, the trial court properly sentenced defendant to 25 years to life on counts 2 and 3.

B. *Section 654*

Defendant argues that under section 654 the trial court should have stayed his sentence on either the evading offense (count 2) or the vandalism (count 4) offense, because his flight from pursuing officers caused his later collision with the Hummer. The People correctly concede that defendant's sentence on count 4, the lesser offense, should have been stayed. We also agree.

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[6] Additionally, an important aspect of the Supreme Court's decision in *Mancebo* was the One Strike law's explicit requirement, set forth in subdivision (f), that the pleaded special circumstance be used to support the imposition of a one strike penalty, and not punishment authorized by any other provision (unless the other provision would result in a greater penalty). (§ 667.61, subd. (f).) Because of this requirement, *Mancebo* held that it was mandatory that the gun-use special circumstance be used to support the one strike sentence, and not the gun-use sentence enhancement. No similar concern exists here.

Section 654, subdivision (a), provides in pertinent part, "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

When offenses arise from a single course of conduct, the permissibility of multiple punishment under section 654 depends on whether the defendant harbored separate intents and objectives. (*People v. Britt* (2004) 32 Cal.4th 944, 952.) Separate objectives may exist "when the objectives were either (1) consecutive even if similar or (2) different even if simultaneous." (*Ibid.*) " ' "If all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once." [Citation.]' " (*People v. Spirlin* (2000) 81 Cal.App.4th 119, 129.) We review for substantial evidence. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

Here, substantial evidence shows that throughout the entire flight incident defendant possessed the objective of escaping, and drove with wanton and reckless disregard resulting in his conviction for evading. His collision with the parked Hummer was incidental to the evading offense. Defendant, therefore, harbored a single intent and objective. In other words, the vandalism was " ' "merely incidental" ' " to the goal of committing the evading, and the trial court should have stayed defendant's sentence on the vandalism (count 4). (*People v. Spirlin, supra,* 81 Cal.App.4th at p. 129.) Instead of remanding, however, we will exercise our authority to modify the judgment. (§ 1260;

People v. Alford (2010) 180 Cal.App.4th 1463, 1473 [appellate court has authority to modify a defendant's sentence under § 1260 in lieu of remanding the matter to the trial court for a new and unnecessary sentencing hearing].) We will modify the judgment by staying the one-year four-month sentence on the vandalism offense (count 4).

III

DISPOSITION

The judgment is modified to stay the one-year four-month sentence on the vandalism offense (count 4) pursuant to section 654. The clerk of the superior court is to amend the abstract of judgment to reflect the foregoing and deliver a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

MILLER
J.